PAGE

Joines vs. Patterson, 274 U. S. 544....3-11-12-13

Love vs. Couger, 130 Ark. 445, 197 S. W. 853 ..... 13

Maney vs. Dennison, 110 Ark. 571, 163 S. W. 783 ..... 13-15

McConnell vs. Day, 61 Ark. 464, 33 S. W. 731 ..... 13

McNeil vs. Garland & Nash, 27 Ark.343..... 14

Mooney *et al.* vs. Cooledge, 30 Ark. 640..... 13

Newman vs. Peay, 117 Ark. 579, 176 S. W. 143 ..... 13

Nicklase vs. Dickerson, 65 Ark. 422, 46 S. W. 945 ..... 13-14

Ringo, Executor vs. Woodruff, 43 Ark. 469, 486 ..... 13

Schrimpscher *et al.* vs. Stockton *et al.*, 183 U. S. 290..... 14-15

Shirley *et al.* vs. Cumberhouse, 41 Ark. 97, 98 ..... 13

St. L. I. N. & S. R. Co. vs. Berry, 80 Ark. 309, 110 S. W. 1049..... 13

Willis vs. Eastern Trust & Banking Co., 169 U. S. 295..... 11

NO. 116

# In the Supreme Court of the United States

October Term, 1928.

ISOM GRAYSON, MICEY KEYS,
PAULINA CAROLINA ET AL.,
*Petitioners in Error,*

vs.

JAMES A. HARRIS, WILLIAM H. HARRIS,
JAMES H. KENNEDY ET AL.,
*Respondents in Error.*

## PETITION FOR WRIT OF CERTIORARI

### Summary of Petition for Writ of Certiorari.

*To the Honorable Justices of the Supreme Court of the United States:*

Petitioners respectfully pray that this Honorable Court grant a writ of *certiorari* to review a judgment of the Supreme Court of Oklahoma which became final upon the denial of a rehearing February 28, 1928 (R. 66). Appeal allowed March 30, 1928 (R. 68). The opinion of the Supreme Court of Oklahoma challenged herein was first filed December 19, 1922 (R. 57). It was later withdrawn

upon rehearing May 29, 1923 (R. 54), and on the same date another opinion was filed (90 Okla. 147), which was later reviewed by this Court on *certiorari* and reversed (269 U. S. 352). Respondents, after this opinion was spread of record, petitioned and obtained from the Oklahoma Court a rehearing, and on November 15, 1927, that Court re-filed and re-adopted its withdrawn opinion of December 19, 1922 (R. 54), on the one question of limitations, and in a supplemental opinion gave its reasons for so doing (R. 55), 264 Pac. 623, 627 (not yet officially reported).

Petitioners, Creek freedmen, heirs at law of Nancy and Garfield Colbert, filed this ejectment action to recover the two Colbert allotments. Respondents alleged that they had been in adverse possession of the premises in question since 1906 (R. 21). The trial court made findings of fact and rendered judgment in favor of petitioners (R. 35 and 36). The Supreme Court did not disturb the trial court's findings, but reversed its judgment (R. 65).

In its nineteenth finding of fact (R. 40), the trial court found that respondents failed to prove any adverse occupancy prior to the year 1912, which was after Statehood. The Supreme Court in its opinion held that although respondents' adverse occupancy did not commence until after Statehood, the Arkansas Statute of Limitations nevertheless commenced to run against petitioners from the date they acquired title by inheritance before Statehood.

A review by this Court on *certiorari* is proper, since the Arkansas Limitations Statute, Section 4471, Mansfield's Digest of the Laws of Arkansas, pleaded by respondents and construed by the Oklahoma Court, is a Federal Statute having been extended to the Indian Territory by Act of Congress of May 2, 1890, Chapter 182, 26 Statutes at Large 81, 94.

The Oklahoma Court's construction of this Federal Statute—that limitations commenced to run against the owner of land from the date of acquisition of title and not from the date of defendants' adverse occupancy—is in conflict with numerous decisions of the Supreme Court of Arkansas, and with this Court's opinion in *Joines* v. *Patterson*, 274 U. S. 544, which adopted the Arkansas Supreme Court's construction of the Statute.

Petitioners would have presented this petition at an earlier date, but were unable to do so as the printed transcript was not available until a few days ago.

Respectfully submitted,

ROBERT M. RAINEY,
STREETER B. FLYNN,
*Attorneys for Petitioners.*

Oklahoma City, Oklahoma,
September 24, 1928.

(July 3, 1923), application was made by these petitioners to this Court for a writ of *certiorari*, which was granted, and on the 2nd day of March, 1925, this Court, in an opinion by Mr. Justice Sutherland, reversed the decision of the Supreme Court of Oklahoma. *Grayson et al.* v. *Harris et al.*, 267 U. S. 352.

Respondents, after the mandate of this Court was spread of record, filed a petition for rehearing in the Supreme Court of Oklahoma, which was granted, and on the 15th day of November, 1927, that Court filed an opinion by Mr. Chief Justice Branson (R. 55), in which the Court re-filed and re-adopted *on the one question of limitations* (R. 54) the first opinion of Mr. Justice Miller (R. 57).

Before going into the questions involved in the re-adopted opinion, it is well to note the reasons given by Mr. Chief Justice Branson for the Court's action, which appear to your petitioners as in complete disregard of their rights. The Chief Justice states that there were two principal questions in the case: first, that involving the Statute of Limitations (R. 55), and second, that involving the construction of the proviso to Section 6 of the Creek Supplemental Agreement of June 30, 1902 (30 Stat. at L. 500) (R. 56). The first opinion, that of Mr. Justice Miller, dealt solely with the Statute of Limitations. It was withdrawn after consideration of your petitioners' petition for rehearing, and the *per curiam* opinion dealing with the con-

struction of the proviso to Section 6 of the Supplemental Creek Agreement was substituted (90 Okla. 147). According to the Court's last opinion prepared by Mr. Chief Justice Branson, this was done not because the first opinion prepared by Mr. Justice Miller was incorrect, but because the (R. 56):

> "*Court deemed a construction of said proviso of such interest and public concern as to require an opinion directly on that question. * * * This opinion of this Court on the said proviso served only one useful purpose and that was it furnished an opportunity for the Supreme Court of the United States to determine whether the said proviso extended to second, third, etc., descent without any limitation.* That Court so determined, which rated as a reversal of the opinion of this Court, cited above on that question.
>
> "This brief history of this suit is given in explanation of the reason this case has not been disposed of long since. It is now before this Court on whether or not the original opinion filed herein is final and conclusive on the question there adjudged by that opinion as determining the rights of the parties on the question of the Statute of Limitation.
>
> "This Court has examined the authorities cited by counsel, and feels that the original opinion filed in this Court sets out the law on that *one controlling proposition*, and the said opinion is by this Court re-adopted, and ordered filed as the opinion of the Court herein." (Italics ours.)

In other words, the Supreme Court of Oklahoma says in effect that the withdrawn opinion by Mr. Justice Miller was correct and settled the case, but that since there was another question involved in the case which the Court

deemed of such great importance to the public generally, it would withdraw its correct opinion and file in its place one dealing with a question upon which it desired an opinion of this Court. Such action by the Oklahoma Court compelled these petitioners to prosecute a futile appeal to this Court, since the Supreme Court of Oklahoma apparently always intended, if its action was by this Court reversed, to defeat petitioners by reaching back and re-adopting the Justice Miller opinion concerning the correctness of which it entertained no doubt.

Your petitioners, in appealing to this Court, did so in good faith, believing that the Supreme Court of Oklahoma, when it withdrew the Miller opinion and granted the rehearing, realized that the Miller opinion incorrectly construed the Federal Statute involved. Your petitioners now see that they were mistaken, and that in spite of their appeal and the decision of this Court in their favor, they are back in the same position they were in the year 1922, and that the time and money spent since that date have availed them nothing. Their expenditures, according to the last opinion of the Supreme Court of the State of Oklahoma, served merely the "useful purpose" of having this Court construe the proviso to Section 6 of the Creek Supplemental Treaty which the Oklahoma Court considered of great public concern (R. 56).

**Statement.**

The opinion of Mr. Justice Miller (R. 57) is said in

the opinion by Mr. Chief Justice Branson (R. 55) to correctly state the law on the question of limitations *"that one controlling proposition"* (R. 57).

The lands in question were the allotments of Nancy Colbert and Garfield Colbert, enrolled Creek freedmen, who died in 1900 (R. 38). Both allotments were made on July 9, 1906 (R. 38). Petitioners claim one-half interest in these lands as the heirs at law of said allottees, and concede that James Brann is the owner of an undivided one-half interest in each allotment (R. 37). The petition in the ejectment action alleges that respondents were in possession and claim some interest in said lands (R. 13). Respondents in their answer pleaded the Arkansas seven-year Statute of Limitations, and alleged that they had been in possession of the premises since the year 1906 (R. 21). Petitioners' reply was a general denial (R. 24). The case was tried in the District Court of Creek County without a jury; findings of fact were made, and judgment rendered in their favor (R. 35 and 36). On appeal, the Supreme Court of Oklahoma reversed the judgment of the District Court of Creek County on the sole question of limitations, 264 Pac. 623, 264 Pac. 627 (not yet officially reported) (R. 55, 57).

The nineteenth finding of fact of the trial court was as follows (R. 40):

> "That the defendants, William Harris and James A. Harris, nor those under whom they claim, took any

# INDEX.


PAGE

Summary of Petition for Writ of Certiorari ..... 1

Petition for Writ ..... 4
History of Case ..... 4
Statement ..... 8
The Federal Question ..... 10
Supreme Court of Oklahoma's Construction of Federal Law ..... 11
Discussion of Supreme Court of Oklahoma's Opinion ..... 12

Federal Statutes Referred to
Sec. 4471, Mansfield's Digest of the Laws of Arkansas Extended to what was Formerly the Indian Territory by Act of Congress of May 2, 1890, Chap. 182, 26 Stat. at Large, 81, 94 ..... 3-11-12

Cases Cited:

Byrd vs. State, 99 Okla. 165 ..... 11

Calhoun vs. Moore *et al.*, 79 Ark. 109, 94 S. W. 931 ..... 13

Foster vs. Elledge, 106 Ark. 342, 153 S. W. 819 ..... 13

Gidney vs. Chappel, 241 U. S. 99 ..... 11

Grayson *et al.* vs. Harris *et al.*, 269, U. S. 352 ..... 6

Harris *et al.* vs. Grayson *et al.*, 90 Okla. 147 .. 2

Harris *et al.* vs. Grayson *et al.*, 264 Pac. 623 (Not yet officially reported) ..... 9

Harris *et al.* vs. Grayson *et al.*, 264 Pac. 627 (Not yet officially reported) ..... 9

James vs. Appel, 192 U. S. 129 ..... 11

## PETITION FOR WRIT OF CERTIORARI.

*To the Honorable Justices of the Supreme Court of the United States:*

Petitioners obtained a writ of error (March 30, 1928, R. 68) in the instant case to review a judgment of the Supreme Court of Oklahoma, in which a rehearing was denied February 28, 1928 (R. 66), since they were uncertain as to the meaning and effect of the following proviso of Section 2 of the Act of January 31, 1928:

> "Provided, however, that the review of judgments of State Courts of last resort shall be petitioned for and allowed in the same form as now provided by law for writs of error to such Courts."

If said Act is not exclusive as to the method of reviewing judgments of State Courts, we believe a review of this case by *certiorari* to be proper, and this Court is authorized under Paragraph C, Section 237, as amended by Act of Congress of February 13, 1925, Chapter 229, 43 Stat. at L. 936, to consider the papers whereon the writ of error was allowed as a petition for *certiorari*. In order to aid the Court in its consideration of the papers, we are presenting this petition.

### History of Case.

This is the second time that your petitioners have been compelled to apply to this Court for a writ of *certiorari* in this case. The case was filed originally in this Court on October 1, 1923, No. 187, October Term 1924, and

this Court granted a writ of *certiorari* directed to the Supreme Court of the State of Oklahoma and later reversed the action of that Court. 267 U. S. 352.

Your petitioners, freedman citizens of the Creek Nation, on the 14th day of August, 1917, filed an action in ejectment in the District Court of Creek County, Oklahoma, against respondents for the purpose of recovering a one-half interest in the lands in controversy which had been allotted to Nancy Colbert and Garfield Colbert (R. 1). An accounting for a one-half interest in the oil and gas taken from the premises was also prayed. The District Court of Creek County made findings of fact (R. 36), and rendered judgment in favor of your petitioners (R. 35). Respondents thereafter prosecuted an appeal to the Supreme Court of Oklahoma, which, on the 19th day of December, 1922, in an opinion written by Mr. Justice Miller, 264 Pac. 623, 627 (R. 57) (not officially reported), reversed the action of the District Court and directed that judgment be rendered in favor of respondents. A petition for rehearing was filed and the opinion in question was withdrawn (R. 54). Thereafter on the 29th day of May, 1923, the Supreme Court of Oklahoma filed another opinion, 90 Okla. 147, and again the judgment of the District Court was reversed with instructions to enter judgment quieting title in respondents.

After the denial of a rehearing on the second opinion

possession whatever of said land until some time in 1912, after the decision of the Federal Court in the case of *Brann* v. *Bell*. * * * That the evidence fails to show an open continuous and hostile possession in the defendants James A. Harris, William H. Harris, James H. Kennedy, the Quaker Oil & Gas Company, and the Ohio Cities Oil & Gas Company, or any of them or their predecessors in title prior to November 17, 1907."

The Supreme Court of Oklahoma did not disturb this finding, but held the trial court had incorrectly construed and applied a Federal law. It will be noted from the finding that respondents undertook the burden of establishing adverse possession before Statehood (when the Arkansas limitations statute governed), but failed. Proving any adverse possession after Statehood would be ineffective as far as they were concerned, since the longer Oklahoma limitations statute of fifteen years had not run at the time this suit was filed.

In order to reverse and render judgment, the Oklahoma Supreme Court held the Arkansas seven-year statute applied, and construed it as beginning to run against petitioners from the date they *acquired title*, even though neither respondents nor any one through whom they claimed were in *adverse possession* at any time *before Statehood* (R. 40, finding No. 19).

**The Federal Question.**

The Arkansas Statute of Limitations held to govern is Section 4471, Mansfield's Digest of the Laws of Arkansas.

It is clear, therefore, that the correctness of the Oklahoma Court's decision turns upon a proper construction of *Federal law*, since Section 4471, Mansfield's Digest, was by Congress extended over the Indian Territory (Section 31, Act of May 2, 1890; Chapter 182; 26 Stat. at L. 81, 94), and when so extended "carried the settled constructions placed upon them by the Courts of that State. So construed, they became in effect laws of the United States as though originally enacted by Congress for government of the Territory." (*Joines* v. *Patterson*, 274 U. S. 544, 549), wherein was cited *Willis* v. *Eastern Trust & Bnkg. Co.*, 169 U. S. 295, 307; *James* v. *Appel*, 192 U. S. 129, 135; *Gidney* v. *Chappel*, 241 U. S. 99, 102; *Byrd* v. *State*, 99 Okla. 165.

Section 4471, Mansfield's Digest of the Laws of Arkansas, is as follows:

> "No person or persons, or their heirs, shall have, sue, or maintain any action or suit, either in law or equity, for any lands, tenements or hereditaments but within seven years next after his, her or their right to commence, have or maintain such suit shall have come, fall or accrued; and all suits, either in law or equity, for the recovery of any lands, tenements, hereditaments shall be had and sued within seven years next after title or cause of action accrued, and no time after said seven years shall have passed." • • •

**Supreme Court of Oklahoma's Construction of Federal Law.**

The Supreme Court of Oklahoma held that the statutory seven-year limitations, a Federal law, began to run from the date title was acquired either by purchase or de-

scent, even though no one was in adverse possession or claimed title thereby, and that the only exceptions to the rule were minors, a *femme covert*, and persons *non compos mentis*, who, if they pleaded and proved their disabilities, would have three years after their disabilities were removed to institute suit.

This position is so startling we will quote from the opinion itself (264 Pac. 623, 625, 626):

> "Neither Gertrude Grayson, nor her heirs, shall have, sue or maintain any action or suit either in law or equity for the recovery of any lands, tenements or hereditaments, but within seven years next *after her title accrued*. That is the title of Gertrude Grayson R. 62) * * *. But when a person acquires title to real estate either by purchase or inheritance, their *'title'* has accrued simultaneously with acquiring it within the meaning of said Section 4471, *supra*. If more than seven years after acquiring title, such person or his or her heirs, bring an action either in law or equity to recover said lands, and the statute of limitations is pleaded as a bar of the right of action, the burden of proof rests upon the plaintiff to show facts that take it out of the bar of the statute of limitaions." (Italics ours) (R. 62, 63).

This conclusion was reached by ignoring the numerous Arkansas decisions interpreting the statute in ejectment cases, and this Court's opinion in *Jones* v. *Patterson*, 274 U. S. 544, 553.

### Discussion of Supreme Court of Oklahoma's Opinion

Since Section 4471, Mansfield's Digest, when extended over the Indian Territory, carried the settled construction

*terson*, 274 U. S. 544, 549), we will refer to some of the Arkansas decisions dealing with the statute of limitations in ejectment cases similar to that now before the Court:

—*Shirley et al.* v. *Cumberhouse*, 41 Ark. 97, 98.

*Nicklase* v. *Dickerson*, 65 Ark. 422, 46 S. W. 945.

*Foster* v. *Elledge*, 106 Ark. 342, 153 S. W. 819.

*Love* v. *Couger*, 130 Ark. 445, 197 S. W. 853.

*McConnell* v. *Day*, 61 Ark. 464, 33 S. W. 731.

*Maney* v. *Denison*, 110 Ark. 571, 163 S. W. 783.

*Newman* v. *Peay*, 117 Ark. 579, 176 S. W. 143.

*Ringo, Executor*, v. *Woodruff*, 43 Ark. 469, 486.

*Mooney et al.* v. *Cooledge*, 30 Ark. 640.

*Calhoun* v. *Moore et al.*, 79 Ark. 109, 94 S. W. 931.

*St. L., I. N. & S. R. Co.* v. *Berry*, 80 Ark. 309, 110 S. W. 1049.

This Court, in *Joines* v. *Patterson*, 274 U. S. 544, 553, adopted the decisions of the Supreme Court of Arkansas, specifically holding that the seven-year statute of limitations began to run from the taking of adverse possession:

> "*Under the settled construction given to the seven-year statute of limitations by the Courts of Arkansas, it began to run against Patterson when Joines took possession.*" (Italics ours.)

This Court's opinion (*Joines* v. *Patterson*) definitely settling the question of Federal law involved herein had been rendered before the Supreme Court of Oklahoma readopted and re-filed the Justice Miller opinion, and that

Court's attention was repeatedly directed to it (see petition for rehearing, part of this record, but not printed) (R. 65).

The correct construction and application of the Arkansas Limitations Statute is of the utmost importance, since the opinion challenged may affect the title of every piece of land alienable before Statehood in that vast area which was formerly Indian Territory. Heretofore everyone has acted upon the belief that if there was no adverse possession prior to Statehood, the Arkansas Statute of Limitations had no application.

The Supreme Court of Oklahoma cited the cases of *McNeil* v. *Garland & Nash*, 27 Ark. 343, and *Schrimpscher* v. *Stockton et al.*, 183 U. S. 290, as sustaining its position that the statute ran from acquisition of title and that the burden of proof when the statute was pleaded by defendants, rested on the plaintiffs. Such is not and never was the law in Arkansas in ejectment actions, and we have herein cited numerous cases to the contrary, in one of which (*Nicklase* v. *Dickerson*, 65 Ark. 97, 20 S. W. 813), it was said:

> "In order to constitute title by adverse possession it must be shown that the possession was actual, hostile, open and exclusive and continued without break for the full period prescribed by the statute. The burden to show this is upon the party claiming title by adverse possession. *Ringo* v. *Woodruff*, 43 Ark. 486."

In the Arkansas case cited in the opinion, attorneys'

fees were involved. The plaintiff, of course, in his petition in such a case must set forth when the services were rendered, and naturally if service of process was not had within the period of limitations, judgment would be rendered for defendant. In ejectment cases the plaintiff sets up his title and has the burden of proving it when it is denied. If the defendant relies on the statute of limitations, he has the burden of proving adverse occupancy for the statutory period. *Maney* v. *Dennison et al.*, 110 Ark. 571, 163 S. W. 783. Plaintiff does not lose his property if he fails to show he did not file some kind of suit against someone within seven years after he acquired title. Were this absurdity the law, a person could wait until seven years after the owner acquired title, and if no suit had been filed, move on the land and acquire title by one day's possession.

*Schrimpscher et al.* v. *Stockton et al.*, 183 U. S. 290, is even quoted from at length as sustaining this position. As we read this opinion, it holds exactly contrary to the views expressed in the Oklahoma Court's opinion. It is clearly stated therein that defendants in error were holding the premises adversely at the time the Indian received an alienable title, and that he was therefore bound to institute ejectment proceedings within the limitations period. In the instant case, respondents did not hold possession adversely at the time title of petitioners was acquired, and the trial court so found (R. 40).

Your petitioners respectfully pray that this Court grant its writ of *certiorari* in order that the Supreme Court of Oklahoma's palpably erroneous construction of Federal law may be corrected.

Respectfully submitted,

ROBERT M. RAINEY,
STREETER B. FLYNN,
*Attorneys for Petitioners.*

Oklahoma City, Oklahoma,
September 24, 1928.